IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT D. ASHENBRENNER, JR. Appellant.	No. 37835-3-II UNPUBLISHED OPINION

Hunt, J. – Robert D. Ashenbrenner, Jr., appeals his jury conviction for possessing a stolen motor vehicle. He argues that (1) the prosecutor committed misconduct by eliciting testimony about a written statement that Ashenbrenner had never signed and that the trial court had previously excluded in a pretrial ruling,[1] and (2) the trial court erred when it denied his motion for mistrial based on the prosecutor's alleged misconduct. We affirm.

FACTS

I. Possession of Stolen Truck

On December 17, 2007, Michael Brehm, vice president of Paul Construction Company in Bellevue, discovered that a Ford "F-50," flatbed or "box" dump truck was missing. Nine days later, a confidential informant notified Grays Harbor County Deputy Sheriff Darrin Wallace that someone was trying to sell a stolen "F450 box dump truck style vehicle," which would be at 3 Copalis Beach Road[2] at 5:00 pm.

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[1] Ashenbrenner reiterates this argument in his Statement of Additional Grounds for Review (RAP 10.10).

[2] Copalis Road is a county road in Grays Harbor County.

A. Arrest

Wallace positioned himself near 3 Copalis Beach Road. Just before 5:00 pm, Robert Ashenbrenner arrived in the stolen truck. Wallace contacted Ashenbrenner, who was unable to produce a vehicle registration. When Wallace turned to examine another vehicle that had followed Ashenbrenner into the parking area, Ashenbrenner attempted to flee on foot.[3] Wallace shot Ashenbrenner with a stun gun, struggled with him, hit him with a police baton several times, and finally subdued him. An ambulance transported Ashenbrenner to the hospital to tend to injuries he sustained during the struggle.

B. Hospital Interview

About three hours later, Grays Harbor County Sheriff's Detective Don Kolilis contacted Ashenbrenner at the hospital. Medical personnel had already examined Ashenbrenner, who was resting on a gurney while the hospital staff processed his paperwork. Kolilis explained to Ashenbrenner that he was there to transport Ashenbrenner to the jail and wanted to talk to him about what had happened.

Using an advice-of-rights form, Kolilis advised Ashenbrenner about his *Miranda*[4] rights. Ashenbrenner acknowledged that he understood his rights, agreed to talk to Kolilis, and signed the form. Ashenbrenner did not appear to be under the influence of medication. Instead, he appeared to Kolilis to be awake, alert, and oriented, and he (Ashenbrenner) asked Kolilis many questions, mostly about what had happened to his (Ashenbrenner's) girlfriend.

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[3] Ashenbrenner's girlfriend had been driving the car that followed Ashenbrenner into the parking area. She drove away when Ashenbrenner ran, but officers later apprehended her.

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Ashenbrenner told Kolilis that (1) he had purchased the truck, which he believed to be worth at least $4,000, for $300 from a man who had approached him at a local swap meet earlier that week; (2) he knew the truck was stolen because of the low price and its lack of paperwork; (3) he thought he could sell it quickly for a profit; and (4) he was on his way to sell the truck when Wallace confronted him. Kolilis prepared a written statement, which he handed to Ashenbrenner to review and to sign. Ashenbrenner did not sign it.

II. Procedure

The State charged Ashenbrenner with possession of a stolen motor vehicle. Ashenbrenner pleaded not guilty.

A. Pretrial CrR 3.5 Hearing

At a pretrial CrR 3.5 hearing, Ashenbrenner moved to suppress the statements he had made to Kolilis at the hospital. Ashenbrenner argued that (1) he had not made any statements; (2) if he had made any statements, he had done so without first being advised of his *Miranda* rights; and (3) even if he had been advised of his *Miranda* rights, he was unable to waive his rights knowingly because he was under the influence of medication and the effects of a stun gun when he made the statements. Defense counsel also advised the pretrial court that Ashenbrenner had not written the statement that Kolilis had in his possession. The pretrial court clarified that defense counsel was moving to suppress the oral statements Ashenbrenner had made to Kolilis, not moving to suppress any physical evidence; defense counsel agreed, reiterating that his challenge was based on "a lack of MIRANDA warning."

Wallace and Kolilis testified as described above. Ashenbrenner testified that (1) the

hospital staff had given him some sort of pain or seizure medication just before Kolilis arrived; (2) although he (Ashenbrenner) recalled Kolilis's going over his *Miranda* rights, he did not recall initialing the advice of rights form; and (3) he did not talk to Kolilis about anything other than his (Ashenbrenner's) concerns about his girlfriend.

In its oral ruling and its written findings of fact and conclusions of law, the pretrial court (1) ruled that Ashenbrenner had knowingly, voluntarily, and intelligently waived his *Miranda* rights; (2) concluded that Ashenbrenner's out of court statements to Kolilis were, therefore, admissible at trial; and (3) commented on the admissibility of the unsigned written statement:

> That doesn't mean that the written statement comes in because in looking at it, it was never signed so it really what it becomes is these are the detective's notes of what was said to him. So he [Kolilis] certainly can testify about what was said to him and if he needs the notes to refresh his recollection, but since the written statement was never signed by Mr. Ashenbrenner, as I can see, it's not actually his adopted statement that would come into evidence—

Report of Proceeding (RP) (3/14/2008) at 35.

The State interrupted, asserting that whether the State could present the unsigned written statement was an "evidentiary matter." The pretrial court responded, "I think you probably agree with that." In its written findings of fact and conclusions of law, the pretrial court ruled that "the out of court statements of the defendant to Deputy [sic] Kolilis" were "admissible for use by the State of Washington in the prosecution of this matter in its case in chief *subject to admissibility pursuant to rules of evidence*." Clerk's Papers (CP) at 23 (emphasis added). The case went to a jury trial before a different superior court judge.

B. Trial

1. State's case

Wallace and Kolilis testified as described above. Kolilis testified in detail about Ashenbrenner's oral statements during the interview at the hospital. When the State asked Kolilis if he had taken notes during the conversation, defense counsel objected on hearsay grounds. The trial court overruled the objection, and Kolilis responded that he had taken notes.

The State then asked Kolilis if he had prepared a written statement based on the interview. Defense counsel again objected on hearsay grounds. The trial court overruled the objection. Kolilis testified that he had prepared a statement and that he had gone over the statement with Ashenbrenner as he prepared it.

The State next asked Kolilis if he had shown Ashenbrenner the written statement. Once again, defense counsel objected on hearsay grounds, and the trial court overruled the objection. Kolilis then testified that Ashenbrenner had reviewed the written statement and that Ashenbrenner had told him (Kolilis) the written statement was correct. Defense counsel did not object to this testimony.

Kolilis next testified that Ashenbrenner had not signed the written statement and that he (Kolilis) did not know whether Ashenbrenner had failed to sign it intentionally or unintentionally. At this point, defense counsel asked for a sidebar. The trial court later summarized the sidebar as follows:

> There was an indication from defense counsel that [the court that addressed the CrR 3.5 issues] has made comments that the matter was not coming in, it was not signed. The prosecution indicated that that was an evidentiary issue, and I resolved the issue right there. I indicated to the parties it was not coming in. My rationale for the record, it was not signed, and furthermore, the officer already testified to the contents of the matter and was therefore cumulative. That's my position.

RP (4/1/2008) at 77. The parties agreed that this was an accurate representation of the sidebar. The State added that it had moved to admit the document "as an admission."

After the sidebar, the State moved to admit the unsigned written statement. The trial court denied the State's motion, and the unsigned written statement was not admitted into evidence.

2. Motion for mistrial

Defense counsel moved for a mistrial, arguing that the trial court had, in effect, admitted the written statement, despite its lack of Ashenbrenner's signature, by allowing the State to elicit testimony that summed up the content of the excluded written statement. The State responded that Kolilis had testified to the content of his conversation with Ashenbrenner, not to the content of the written statement. Concluding that Kolilis's use of and reference to the written statement was no different than an officer's using a report to refresh his memory, the trial court denied Ashenbrenner's motion for mistrial.[5]

3. Defense case

Ashenbrenner testified that (1) he had not suspected that the truck was stolen, even though he was aware it was worth approximately $3,500 and he made no attempt to verify the title; (2) he had purchased many vehicles without titles, had never purchased a stolen vehicle before, and would never knowingly purchase a stolen vehicle; (3) he ran from Wallace because he (Ashenbrenner) had an outstanding warrant and was driving with a suspended license; (4) he

[5] Defense counsel reiterated that the court had previously ruled that the written statement would not come in at trial.

never told Kolilis that he knew or should have known the truck was stolen; (5) the unsigned written statement was not accurate; and (6) he told Kolilis the written statement was inaccurate.

Ashenbrenner's friend Robert Blanchard, a used car lot owner, testified that (1) Ashenbrenner had purchased the truck for $300 at a swap meet; (2) the seller told Ashenbrenner that he was trying to get rid of the truck so his wife would not receive it in their divorce; and (3) although he (Blanchard) believed the truck was worth around $6,000, he never told Ashenbrenner that he suspected the truck was stolen.

The jury found Ashenbrenner guilty of possessing a stolen motor vehicle. Ashenbrenner appeals.

ANALYSIS

I. No Prosecutorial Misconduct

Ashenbrenner first argues that the State committed prosecutorial misconduct when it intentionally violated the trial court's CrR 3.5 ruling in limine prohibiting the State from referring to Kolilis's notes as his (Ashenbrenner's) adoptive statements. We disagree.

A. Standard of Review

"To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial." *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), *cert. denied*, 127 S. Ct. 2986 (2007). We review a prosecutor's alleged misconduct "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)).

B. No Final Ruling in Limine

Ashenbrenner's argument that the State deliberately violated the trial court's pretrial ruling in limine presupposes that the trial court made a final ruling on the admissibility of the written statement at the CrR 3.5 hearing. The record does not show that the trial court made such a final ruling. On the contrary, the record shows that during the CrR 3.5, the trial court reserved ruling on admissibility of the written statement.

"[T]he purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial." *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The party losing the motion in limine has a standing objection if the trial court makes a "final ruling" on the motion, "'[u]nless the trial court indicates that further objections at trial are required when making its ruling.'" *Powell*, 126 Wn.2d at 256 (quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *superseded by*, 113 Wn.2d 520, 782 P.2d 1013 (1989)). The Washington State Supreme Court has explained:

> If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. *When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial*.

Koloske, 100 Wn.2d at 896 (emphasis added).

Here, although the trial court discussed the unsigned written statement at the CrR 3.5 hearing, it also recognized that admission of the written statement was an evidentiary issue; and the trial court made no definitive oral ruling on that evidentiary issue. Furthermore, the trial

court's CrR 3.5 hearing written findings of fact and conclusions of law noted that Ashenbrenner's statements to Kolilis were "admissible for use by the State of Washington in the prosecution of this matter in its case in chief *subject to admissibility pursuant to rules of evidence*." CP 23 (emphasis added). Thus, both the trial court's oral ruling and its written findings of fact and conclusions of law demonstrate that (1) any potential ruling about the admissibility of the unsigned statement was not final, and (2) Ashenbrenner had a duty to raise the evidentiary issue at the proper time at trial to obtain a final ruling.

Because the trial court made no final pretrial ruling on the admissibility of any evidence related to the unsigned written statement, the State did not violate any ruling in limine when it presented such evidence at trial. Accordingly, Ashenbrenner's prosecutorial misconduct argument fails.[6]

II. No Mistrial

Ashenbrenner next argues that the trial court erred when it denied his motion for a mistrial. He contends that the trial court should have granted his motion for mistrial because the State failed to comply with an alleged pretrial order in limine excluding evidence that Ashenbrenner had "made an adoptive 'statement' to Kolilis." Br. of Appellant at 9. Again, we disagree.

We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A trial court abuses its discretion in denying a

[6] We note that Ashenbrenner frames his argument on appeal as a prosecutorial misconduct issue. He does not argue that testimony suggesting Ashenbrenner adopted the written statement was inadmissible.

motion for mistrial when a trial irregularity is so prejudicial that nothing short of a new trial can insure that the defendant will be tried fairly. *Id*. (citing *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). Such is not the case here.

Having already held above that the State did not violate any pretrial order in limine, Ashenbrenner's mistrial argument fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Quinn-Brintnall, J.

Penoyar, A.C.J.